United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7174

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRANCES JOY CAPERS, et al.,

Plaintiffs-Appellants,

against

LONG ISLAND RAIL ROAD, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
JUL 15 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF OF APPELLEE

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TABLE OF ABBREVIATIONS

75 TR	—	Refers to transcript pages of the October 1975 evidentiary hearing on Mr. Harris' application for a preliminary injunction.
75 D Exh.	—	Refers to defendant's exhibits admitted in evidence at the October 1975 evidentiary hearing on Mr. Harris' application for a preliminary injunction.
75 P Exh.	—	Refers to plaintiff's exhibits admitted in evidence at the October 1975 evidentiary hearing on Mr. Harris' application for a preliminary injunction.
TR	—	Refers to transcript pages of the December 1976-January 1977 evidentiary hearing on Mr. Harris' application for a preliminary injunction.
D Exh.	—	Refers to defendant's exhibits introduced into evidence at the December 1976-January 1977 evidentiary hearing on Mr. Harris' application for a preliminary injunction.
P Exh.	—	Refers to plaintiff's exhibits introduced into evidence at the December 1976-January 1977 evidentiary hearing on Mr. Harris' application for a preliminary injunction.
OP	—	Refers to pages of Judge Gagliardi's Opinion filed March 25, 1977.

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRANCES JOY CAPERS, et al.,

Plaintiffs-Appellants,

against

LONG ISLAND RAIL ROAD, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE

Preliminary Statement

Plaintiff, Edward E. Harris, an individually named plaintiff in this class action, is appealing from an Order entered March 25, 1977, by the Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, which Order denied Plaintiff Harris' motion for a preliminary injunction. Judge Gagliardi's opinion is not as yet officially reported.

Issues Presented for Review

1. What is the scope of this Court's review of a denial by a District Court of an application for a preliminary injunction in a Title VII class action where the basis for the decision of the court below is set forth in its

opinion and is founded upon all of the evidence of record as well as upon the Court's evaluation of the credibility of the witnesses after a six-day evidentiary hearing?

2. Was there reasonable evidence of record to sustain the finding of the court below that the LIRR's demotion of Plaintiff Harris was for nondiscriminatory reasons and that those reasons were not pretextual?

3. Was the court below clearly erroneous in finding that Plaintiff Harris had not met his burden of showing that he received disparate treatment?

Statement of Facts

Plaintiff Harris was employed in 1954 by the Pennsylvania Railroad Company (PRR), the owner and operator of Pennsylvania Station. Mr. Harris worked for the PRR in various capacities until 1964 when, by agreement between PRR and its tenant at Pennsylvania Station, The Long Island Rail Road Company (LIRR), those ushers, police officers and assistant stationmasters who regularly worked on the LIRR side of Pennsylvania Station, were transferred from the employment and payroll of PRR to LIRR. Mr. Harris, as an usher on the LIRR side of Pennsylvania Station, was included in this transfer and went on LIRR's payroll in July 1964. (75 TR pp. 8-10; 75 D Exh. R). Approximately a year and a half later in January 1966, ownership of LIRR was acquired by the State of New York through its agent, Metropolitan Transportation Authority (MTA), a public benefit corporation organized and existing pursuant to Title 11 of the New York Public Authorities Law. Subsequently, in 1967, pursuant to further agreement, yardmasters supervising LIRR drill moves at Pennsylvania Station were transferred from PRR's payroll and employment to that of LIRR (TR 146), although Pennsylvania Station train directors and tower

operators controlling LIRR movements as well as the drill crews performing them still remained in the employ of and under the control of PRR and its successor companies.[1] (TR 239-240; TR 341-342).

Mr. Harris' LIRR Employment 1964-1972

As previously indicated, Mr. Harris came onto the LIRR payroll in July 1964 as an usher,[2] but it was not until August 1967 that he first made application for consideration for training to qualify for promotion to the position of Assistant Stationmaster (ASM). (75 P Exh. 2). Mr. Harris was accepted for such consideration and advised of the qualification process. During this same period, several other persons, including two other blacks, were also accepted for consideration and qualification. (TR 581, 582). This being the first time that LIRR had the responsibility for accepting and qualifying applicants for the position of ASM, upon review, it made some changes in the procedures formerly utilized by PRR, the result of which was that Mr. Harris filed a complaint with the New York State Division of Human Rights (NYSDHR) in December 1967. (75 TR 157). Following an investigation, the NYSDHR found no probable cause and dismissed the complaint and from this dismissal, no appeal was taken.[3] (75 D Exh. N). Subsequently, in 1968, a white person, Robert Partridge, was appointed as ASM and Mr. Harris again filed a complaint with the NYSDHR (75 D Exh. O) and once again,

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[1] Penn-Central Transportation Co., Consolidated Rail Corporation and presently Amtrak.

[2] Thus, Mr. Harris' employment with LIRR is only 13 years and not the 23 years claimed in his brief, although admittedly pursuant to the agreement with PRR, his period of service with it is utilized when calculating Mr. Harris' position in the usher's seniority list or his period of service for pension purposes.

[3] To dismiss a complaint on the basis of no probable cause, it must appear as a matter of law that the complaint lacks merit *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 App. Div. 2d 310, 307 N.Y.S.2d 691 (4th Dept. 1970).

the NYSDHR found no probable cause and dismissed the complaint. (75 D Exh. P).

In March 1971, Mr. Harris again filed a complaint with the NYSDHR alleging that his desired promotion to the position of ASM had been withheld from him in retaliation for his having filed the previous complaints as well as alleging other claimed unequal working conditions. (75 D Exh. Q). This time, the NYSDHR assigned the matter to a full public hearing at which Mr. Harris was represented by counsel.[4] Following three days of hearing and the filing of briefs, the NYSDHR issued a decision and order finding that the LIRR had not retaliated against Mr. Harris and dismissing the complaint. (75 D Exh. R). Mr. Harris appealed to the New York State Human Rights Appeal Board (NYSHRAB), which after hearing arguments and reviewing the entire record, affirmed the decision and order of the NYSDHR in all respects.[5] (75 TR 162). As was specifically noted in this decision, there was not a scintilla of evidence to establish that a vacancy existed or was withheld from Plaintiff Harris from November 1968 to March 1, 1971.

In November of 1972, Mr. Harris was appointed by the LIRR to the position of ASM at Pennsylvania Station.

Mr. Harris' Record as a LIRR ASM

Even while functioning as an extra ASM, Mr. Harris demonstrated an inability to adequately perform his job and a hostile attitude towards his superiors. In July 1971,

[4] His present attorney of record, Jack Greenberg, Esq., who appeared by Morris J. Baller, Esq., of counsel. (75 D Exh. R).

[5] As indicated at 75 TR 162, a copy of the Decision of NYSHRAB was not available at the 1975 hearing, but a copy was submitted to the court below in January 1976 along with LIRR's Reply Brief as a late filed exhibit without objection from plaintiff. Although no exhibit number was assigned, further reference herein will be made to the NYSHRAB decision as Exhibit R-1.

while working as an extra ASM on the second trick,[6] he lost complete track of the train movements in and out of Pennsylvania Station. When the Terminal Superintendent, Merrill Stewart, directed him to get his records straightened out and up to date, he refused and Mr. Stewart had to remove him from the ASM chair and do the work himself. (75 TR 237, 238). Mr. Stewart also introduced a number of written reprimands given to Mr. Harris during the period April 1, 1971, to March 3, 1972. (75 TR 239, 75 D Exh. S, T, U, V and W).

Mr. Rizzacasa, LIRR Terminal Trainmaster at Penn Station, in his testimony in 1975, also noted the inability of Mr. Harris to perform his job adequately and keep track of trains. (75 TR 341, 342).

Joseph Gaynor, who became the LIRR's terminal superintendant at Penn Station in June 1974 (75 TR 384), testified as to the unsatisfactory record of Mr. Harris. (75 TR 388-390; 392-394). A number of these documents were put into the record during cross-examination of Mr. Harris at the 1975 hearing (75 D Exh. B, C, D, E, F, G, H, I, J, K and L) covering the period from October 1974 to September 1975. During cross-examination, Mr. Harris, despite attempts to evade the questions, was forced to admit the factual truth of the matters contained in the various memoranda. (75 TR 163-189).

Similarly, since the 1975 hearing, there have been several incidents where Mr. Harris was sent memoranda requesting explanations of events that occurred during his tour of duty which he failed to answer. (TR 493; 755-757, P Exh. 7, 8).

The August 1974 Book of Rules Examination

In August of 1974, Mr. Harris was due for his regular periodic review and examination on the LIRR Book of Rules and was scheduled originally to take it along with

[6] 3:00 p.m. to 11:00 p.m.

several other ASMs on August 1, 1974. (75 TR 46). However, Mr. Harris failed to keep his appointment on August 1, 1974, because he fell asleep in his car at Jamaica. (75 TR 46, 47). Since he admittedly failed to notify the LIRR of his whereabouts (75 TR 47) and the LIRR management had been unable to contact him to find out whether he was ill, injured or otherwise unavailable for work (75 TR 374), a replacement was called in to take Mr. Harris' place that night and when Mr. Harris reported in he was sent home (75 TR 373), since the job was already covered.

Mr. Harris was then rescheduled for his periodic examination on August 21, 1974, which rescheduling was set up and ordered by the LIRR's Chief Rules Examiner, John Greer. (75 TR 375, 376). It was this examination that he failed and for which failure he was relieved of his duties and promptly rescheduled for a re-examination, although Mr. Harris saw fit to apply to the court below rather than voluntarily take the re-examination. (75 TR 156; 75 D Exh. M). As a result of the conference before the court below in September 1974, Mr. Harris took a re-examination along with a number of other ASMs. Mr. Harris passed this examination and was promptly returned to his duties while the four others who failed were held out of service pending a re-examination. Similarly, as a part of the upgrading of Safety Standards of the LIRR, all other management personnel were required to take written examinations on the Book of Rules and the physical characteristics of the Railroad. (75 TR 346, 347). The record does not contain any instance of a person being allowed to remain in service after flunking a Book of Rules examination.[7]

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[7] Both Mr. Rizzacasa and Mr. Lansperg failed the physical characteristics examination, which was an examination not required of ASMs. As explained by Mr. Rizzacasa, had they failed the Book of Rules examination, they too would have been taken out of service. (75 TR 379).

Mr. Harris' 60-Day Suspension in 1975

In September of 1975, Mr. Harris was removed from service, not as is claimed at p. 14 of Plaintiff's Brief for failing to have an usher announce a track change for a single departing train, but rather for answering back and being insubordinate to his superior.

As a result of some delay problems involving some early morning trains, Mr. Rizzacasa undertook to determine the cause of the delays by riding the problem train and, thus, arrived at Pennsylvania Station earlier than his usual arrival hour. (75 TR 351, 352). Upon arriving at Pennsylvania Station, he noticed people awaiting a train on the wrong side of the platform. Not hearing any announcements being made, he went up and checked the gate and found the train was misposted. (75 TR 352, 353). Mr. Rizzacasa then went to the stationmaster's office and asked Mr. Harris when he was going to have the track change announced. Mr. Harris, in reply, advised Mr. Rizzacasa to tell the assistant trainmaster on duty and have him do it. (75 TR 353). Mr. Rizzacasa then directed the usher, Mr. Shearer, to make the announcement[8] and when he made the wrong announcement, had him correct it. (75 TR 353; 75 TR 118; 75 TR 297, 298; 75 D Exh. A; 75 P Exh. 15; 75 TR 105). Having gotten the situation corrected without Mr. Harris' cooperation or assistance, Mr. Rizzacasa then advised Mr. Harris that it was his responsibility to see that the usher and the announcer knew of track changes

[8] At p. 15 of Plaintiff's brief, it is claimed that Harris told the usher to make the correct announcements, but the testimony of record refutes that and shows Mr. Rizzacasa gave the orders to the usher. (75 TR 353; 75 TR 297, 298; 75 TR 105). Whether or not Mr. Harris had given proper instructions at 6:30 a.m. is immaterial since at 6:46 a.m. he did not do so when directed to by his superior.

and made proper announcements at which point Mr. Harris replied:

> Don't yell at me here. You do that at home and not here.
> (75 TR 353, 354; 75 TR 297)

With that, Mr. Rizzacasa took Mr. Harris out of service for insubordination and for being derelict in his duty.[9] (75 TR 354).

Mr. Rizzacasa then reported the fact of Mr. Harris' removal from service to the Director of the Movement Bureau and asked him to advise Mr. Dixon, LIRR's Assistant Superintendent of Transportation, of it when he arrived.[10] About 20 minutes later, when he knew Mr. Dixon would be in, Mr. Rizzacasa called Mr. Dixon and gave him an oral report on what happened and why he took Mr. Harris out of service. (75 P Exh. 12). Subsequently, Mr. Rizzacasa gave both an oral and written report to his immediate superior, Mr. Gaynor. (75 TR 392). Mr. Gaynor, after reviewing Mr. Rizzacasa's report and Mr. Harris' personal file, affirmed the decision and so advised Mr. Dixon. (75 TR 392, 393, 394).

Mr. Harris promptly went to court and after an extensive evidentiary hearing, but before the filing of briefs, accepted as discipline a 60-day suspension commencing September 12, 1975, the day he was removed from service as an ASM.[11] Upon the expiration of the suspension period, Mr. Harris, in accordance with normal railroad procedures, was ordered to the Medical Department for examination and returned to duty as an ASM.[12]

[9] Since neither Mr. Lansperg nor Mr. Shearer had evidenced any insubordination, no disciplinary measures were appropriate in their cases.

[10] Since Mr. King is not Mr. Rizzacasa's superior, it is not surprising that Mr. Rizzacasa did not go into details or give all his reasons for removing Mr. Harris from service to Mr. King.

[11] In this regard, the suspension only went to his position as an ASM. During the suspension period, he was free to work as an usher, but he voluntarily refused to do so. (75 TR 422).

Mr. Harris' Demotion in November 1976

On the night of November 9 and 10, 1976, while Mr. Harris was on duty as ASM and in charge of LIRR operations at Pennsylvania Station, four trains were delayed in either arriving or leaving the station as a result of one of the tunnel lines being taken out of service at 12:41 a.m. to the surprise of Mr. Harris. The evidence of record in regard to whether or not Mr. Harris had received actual prior knowledge of the time the tunnel line was to go out of service was contested sharply by both parties. The court below, without resolving this conflict, held Mr. Harris to have been negligent in the performance of his duties as an ASM in regard to the delays.

The next morning, prior to the regular management round table analysis and discussion[13] of the preceding 24 hours' operating problems, Mr. Dixon, Assistant Superintendent of Transportation, reviewed the logs for the 24-hour period and then called Mr. Gaynor's assistant, Charles O'Brien, at Pennsylvania Station and told him to have reports obtained from the various individuals involved. Mr. Dixon then called Mr. Gaynor at home and asked him to stop off at Jamaica before he went on into New York. (TR 600). Mr. Gaynor subsequently issued orders to Mr. Bloomfield, one of the assistant trainmasters assigned to Pennsylvania Station, to obtain writeups from

[12] Plaintiff objected to having to undergo a medical examination despite a 60-day absence. After a further evidentiary hearing, the Lower Court agreed this was normal railroad procedure for legitimate railroad purposes and directed Mr. Harris to submit to it.

[13] Regularly referred to in the railroad as "Ding-Dong School." (TR 600, 601).

the involved LIRR personnel. (TR 483, 484; TR 444, 445). Mr. Gaynor then talked with Mr. Civitillo, the Amtrak operator at C Tower, and obtained his version of what occurred that night. (TR 484; TR 413, 414).

Mr. Bloomfield testified that he advised Mr. Harris that Mr. Gaynor wanted a written report from him and that he was ordered to have it ready before he left for home the next morning.[14] (TR 445). Mr. Bloomfield then spoke to Mr. Lehr and gave him the same instructions (TR 447, 448), following which he spoke to the usher on duty, Mr. Shearer, and told him to write a report (TR 448), subsequent to which he then talked to Mr. Harris again. (TR 451). Mr. Bloomfield then prepared his own report for Mr. Gaynor and turned it in. (D Exh. I).

Mr. Harris testified he was unable to write the requested report that night because of the Sperry cars operating through the tunnels (TR 71, 72) and that though he tried in the morning he was too tired to write it. (TR 72, 73). He testified that he then caught an 8:10 train to Jamaica and when he arrived home, he called Mr. Rizzacasa and explained he had been unable to complete his report but would bring it in that night.[15] (TR 73, 74). Mr. Harris then went to bed and awakened around 4:00 p.m. While he was brushing his teeth, an inlay fell out which required him to visit his dentist immediately. (TR 74, 75). Following this, he returned home and went to bed again, getting up just in time to have dinner and report to work. (TR 75).

When Mr. Harris arrived at Pennsylvania Station, he was met by Mr. Gaynor who, having been advised by Mr. Rizzacasa that Mr. Harris would be bringing his report

[14] i.e. at 7:00 a.m., November 11, 1976.

[15] For the refutation and proof of the falseness of this testimony by Mr. Harris, see Addendum A annexed hereto, pages A2-A3.

in with him that evening, asked him for his report and after being advised he didn't have it and not receiving any answers to his questions, except that everyone else was lying, Mr. Gaynor told Mr. Harris he was demoted and to exercise his seniority as an usher. (TR 489-492; D Exh. K). Mr. Gaynor explained that his reasons[16] for demoting Mr. Harris were based upon ". . . his attitude, his acts of insubordination, no change in his attitude toward making writeups, his lack of willingness to accept responsibility, and his attitude toward his fellow employees." (TR 493). Mr. Gaynor then prepared his report and delivered it to his superior, Mr. Dixon, the next day (TR 495) who, based upon his knowledge of Mr. Harris' record and performance, affirmed Mr. Gaynor's decision. (TR 606-609).

The LIRR's Disciplinary System in Regard to Nonrepresented Management Personnel

Plaintiff's Brief makes a number of false claims and outright misstatements of fact concerning the LIRR's disciplinary system in regard to nonrepresented management personnel.

First, plaintiff claims it is undisputed on the record below that Harris is the only ASM ever removed from his job for any reason. This ignores the fact that Mr. John Gallagher was removed from his job as an ASM in the mid-sixties by the then Superintendent of Transportation, Mr. Bowers, for failure to immediately answer one of his questions during a transportation crisis. It was, *inter alia*, the reappointment of Mr. Gallagher that Mr. Harris complained about to the NYSDHR in March 1971, and which the NYSDHR in its decision (75 D Exh. R) noted " . . .

[16] That his reasons included holding Mr. Harris actually responsible for the train delays and his refusal to admit his responsibility for such delays was made clear by Mr. Gaynor on cross-examination (TR 535), contrary to the statements made by plaintiff at page 23 of his brief.

was actually a reappointment after a suspension for dubious reasons and made to rectify an error in judgment . . ." Similarly, even plaintiff concedes (p. 12 of plaintiff's brief that the four ASMs who failed the Book of Rules examination in September 1974 were suspended and held out of service until they took another examination and requalified.

Second, plaintiff claims that the only management employees ever demoted for insubordination were those individuals who, in December of 1972, refused to obey direct orders to cross a picket line and move trains containing perishable goods during a protracted and bitter strike. (Plaintiff's Brief, page 29). This ignores, of course, the demotion for over two years of Mr. Gallagher from his ASM position cited just previously. Similarly, it ignores the demotion of Mr. Lansperg from assistant trainmaster to yardmaster by Mr. Steele. (TR 573, 574).

Whether or not the insubordination of refusing to cross a picket line is more egregious than the insubordination of Mr. Harris in failing to write and hand in a report when directed to, particularly when viewed in light of his record of insubordination in September 1975, and his insubordinate attitude to Mr. Stewart in July 1971 (*supra*, p. 5), is a matter of speculation. Moreover, the demotion of Mr. Harris was not merely for insubordination, but was also based upon his responsibility for the delays the night of November 9-10, his refusal to accept responsibility for the delays, his attitude towards his co-workers and his poor performance record over a period of many years. All of this together would appear to be the same type of record, if not qualitatively worse, as led to the demotion of Messrs. Dolmat, Howell, Roberts and Lyons (TR 671), as well as Mr. Roman (TR 672, 673), Mr. Laurence (TR 680) and Miss Duryea (TR 680), all white persons.

While, as indicated by Mr. Dixon (TR 681, 682), the LIRR would ideally like to give the same discipline for the same offenses to all personnel, represented as well as

nonrepresented management employees, the fact remains that the same offense by the latter group often has to be viewed more seriously and disciplined more severely than when committed by the former group because of the very difference in positions held. Thus, the offenses of Mr. Harris in November 1976, when coupled with his entire record and the fact that as a member of management he was supposed to assume responsibility, set an example and effectively direct the activities of others, amply justified his demotion.

I. Based Upon the Limited Scope of Review Set Forth in Rule 52(a), the Findings and Decision of the District Court Should Be Upheld

The hearing below consumed over six full days of testimony and over eight hundred pages of trial transcript. There was also a 3-day evidentiary hearing in 1975. In addition, the plaintiffs were afforded the opportunity to conduct extensive pre-hearing discovery. After careful consideration of the evidence presented before him, the trial judge wrote a lengthy opinion clearly setting forth his findings and conclusions. Under its limited scope of review, the Court of Appeals should uphold the decision of the trial court.

The federal rules set forth the limited scope of review of an appellate court. Rule 52(a) provides:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Where, as here, the facts are sharply contested, great deference must be given to the findings of the court. As the Supreme Court has held:

> In applying the clearly erroneous standard to the find-

> ings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence.
>
> *Zenith Radio Corp.* v. *Hazeltine, Research Inc.*, 395 U.S. 100, 123 (1969); *See also, Lassiter* v. *Fleming*, 473 F.2d 1374 (2d Cir. 1973)

It is not enough that the appellate court might have reached a different result. The appellate court cannot substitute its judgment for that of the trial court in absence of clear error. *United States* v. *Jones Beach State Parkway Authority*, 255 F.2d 329 (2d Cir. 1958). The appellee is entitled to the benefit of all reasonable inferences and to have evidence viewed in a light most favorable to it. *Stacher* v. *United States*, 258 F.2d 112 (9th Cir. 1958).

In a case such as the one at bar, where discrimination is alleged, it is particularly important to judge the motivation of witnesses. As the Supreme Court has stated:

> Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.
>
> *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949)

The trial court had the unique opportunty to judge the credibility of Mr. Harris against the testimony of numerous other witnesses. The Court of Appeals should not now "give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495 (1950).

The scope of review in civil rights cases is no different:

> We review findings of fact in Title VII case in the same manner as other fact findings of the trial court are reviewed. This Court may not set them aside unless it is able to conclude that such findings are "clearly erroneous" Rule 52(a) F. R. Civ. P.
>
> *Smith* v. *Delta Air Lines, Inc.*, 486 F. 2d 512, 514 (5th Cir. 1973)

And the same standard is employed when reviewing motions for injunctions, where, as in other cases covered by Rule 52(a), the trial court's findings of fact should not be set aside unless "clearly erroneous." *Unicon Management Corp.* v. *Koppers Co.*, 366 F. 2d 199 (2d Cir. 1966).

Plaintiff has attempted to attack the decision of the lower court by arguing that the findings were vague and lacked particularization. However, there is no requirement under 52(a) that the trial court specify and discuss every event.

> [T]he judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaborization of detail or particularization of facts.
>
> *Notes of Advisory Committee on 1946 Amendment to Rule 52(a)*

As the Second Circuit has previously held:

> Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law.
>
> *Petterson Lighterage and Towing Corp.* v. *New York Central R. Co.*, 126 F. 2d 992, 996 (2d Cir. 1942)

Based on these principles, the findings of the trial court clearly meet the requirements of Rule 52(a).

The findings of the trial court should not be overturned unless clearly erroneous. This general rule is applied in both motions for preliminary injunctions and in civil rights cases. Great deference should be given to the findings of the trier of facts, particularly when questions of motive, design and intent are involved. Under these principles, it is clear that the findings and decision of the trial court fully meet the requirements of Rule 52(a) and should be upheld.

II. The Record Sustains the Finding of the Court Below That Plaintiff Harris' Demotion Was For Nondiscriminatory Reasons Which Were Not Pretextual.

As indicated above, unless the findings of the court below are clearly erroneous and find no support in the record, these findings are binding on this Court and the decision below must be affirmed.

A. The Finding That The Demotion Was For Non-discriminatory Reasons

As summarized by the court below (OP pp. 12, 13), the LIRR's non-discriminatory reasons for demoting Mr. Harris were essentially threefold; his insubordination in failing to supply the urgently requested report, his negligence and poor performance of his duties as an ASM on the night of November 9-10, 1977, and his prior record of poor performance and insubordination.

1. Plaintiff's Insubordination

Plaintiff, at pages 59-61 of his brief, attempts to limit "insubordination" to only those instances where there is ". . . an intentional, direct refusal to obey an order" and claims that since he never did refuse to write a report and

his delay in writing the report was only a brief 24 hours, he was not guilty of insubordination.

The dictionary[17] defines "insubordination" as:

> Not subordinate; specif.: a. Not submitting to authority; disobedient, mutinous.

This definition says nothing about a conscious refusal to obey a "direct instruction" from a superior, although there is no question but that such a conscious refusal also constitutes a form of insubordination. In support of the attempted limitation on the definition of insubordination, plaintiff's brief at pages 59 and 60 cites several cases, none of which, when read, substantiate or support the limitation, although they do agree that a conscious refusal to obey a direct order does constitute insubordination. In fact, *Jack* v. *American Linen Supply Co.*, 498 F. 2d 122 (5th Cir. 1974), cited by plaintiff, would seem to be in complete accord with the dictionary definition quoted above. As was noted in *Jack* by the Fifth Circuit at p. 124:

> There is ample evidence * * * to support the finding that Mrs. Jack's dismissal was not due to her race but rather because of her repeated refusals to do her work as instructed *and her insubordinate, aggressive conduct* on the day of her dismissal. (emphasis added)

The record amply supports the conclusion that Harris deliberately elected not to comply with the direct orders he was given to promptly prepare and file a written report. The speciousness of his excuse that he was too busy the night of November 10-11, 1977, was sufficiently clear[18] that his failure to write the report can only be regarded as contumacious and insubordinate. At page 8 of his opinion, Judge Gagliardi specifically found that:

> While there were some active periods that night,

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[17] Webster's New International Dictionary, 2nd Edition.

[18] See Addendum A annexed hereto, pages A2 and A3.

> Harris could have written the report any time during his shift.

In addition, it is clear that Judge Gagliardi found Mr. Harris' testimony about staying late that morning incredible by finding that Harris declined to stay late. (Op p. 8).

Similarly, Mr. Harris' excuse for the failure to write the report during the day of November 11 is another sham. Even though LIRR concedes that Mr. Harris lost an inlay at about 4:00 p.m. that day and visited his dentist (TR 758), Mr. Harris condemns himself by his own testimony that upon his return from the dentist at about 7:00 p.m., he went back to bed, and slept and that when he woke up, he fixed dinner and proceeded to work, arriving shortly before 11:00 p.m., without any attempt to write the requested report (TR 75) which he had promised Mr. Rizzacasa he would bring in that evening. (TR 73, 74). Judge Gagliardi noted at pages 8 and 9 of his opinion:

> He returned home by 7:00 p.m. and instead of writing the report went back to sleep, ate dinner and returned to work.

Plaintiff argues (at p. 61 of his brief) that since it was only 24 hours since Mr. Bloomfield had ordered him to write the report, he wasn't guilty of insubordination as Mr. Dixon, in his testimony (TR 633), had indicated that 24 hours was a tolerable period. This ignores the facts that he had promised Mr. Rizzacasa he would have the report with him when he reported to work that night, that the 24 hours had expired and, even if, which the LIRR does not concede, Mr. Harris had sincerely intended to write the report that night and hand it in in the morning, it would have still been at least 32 hours after the order and clearly within Mr. Dixon's concept of insubordination.

Plaintiff's claim (at pages 62-63 of his brief) that the decision of the court below was based upon a finding that

Harris' first report in the stationmaster's log book was "too short" completely misstates the actual finding by the Court. At page 8 of his opinion, Judge Gagliardi stated:

> Harris was told by Gaynor's assistant that the stationmaster's log book report, which Harris had already written was insufficient and Harris knew he had to prepare a new and more complete written report.

What, of course, was involved was not a contest to see who could write the longest report as plaintiff implies, but an attempt by management to find out why Mr. Harris claimed not to know that line 3 was going out of service after Train 400 departed when the indications from all of the other personnel involved that night pointed to the conclusion that Mr. Harris had been informed, not once, but several times well prior to 12:39 a.m., November 10, 1977. The legitimacy of a request of this nature designed to avoid similar problems in the future cannot be questioned. The report was being sought for managerial operating purposes and not, as imagined by plaintiff, as a conspiracy to get him.

2. Plaintiff's Negligence and Poor Performance on November 9-10

The second aspect of the finding by the court below that Mr. Harris' demotion was nondiscriminatory involves his poor performance and negligence as an ASM on the night of November 9-10. While Judge Gagliardi did not rule specifically on whether or not Harris actually had knowledge prior to 12:39 a.m. that line 3 would go out of service following the departure of Train 400 at 12:21 a.m., he did find specifically (OP p. 12) that Mr. Harris had a responsibility and duty to find out just when the line was going out and to plan accordingly. It was Mr. Harris' failure to fulfill his responsibility and duty that led Judge

Gagliardi to conclude that Mr. Harris was negligent in the performance of his ASM duties.

The court below was fully aware that Mr. Harris was the senior LIRR management representative on duty at Penn Station that night and that as the ASM in charge of the station, he had the ultimate responsibility for what occurred that night. The court below was also aware that all of the other personnel on duty at Penn Station were aware by midnight that line 3 would go out of service after the departure of Train 400 at 12:21 a.m. (See Addendum A annexed hereto, pages A3-A5).

Plaintiff, at page 57 of his brief, argues that the findings of the court below in this regard are flawed because the LIRR never claimed at the trial that Harris' responsibility for the train delays was a reason for demoting him and in support thereof cites Mr. Gaynor's testimony at TR 492-493, ignoring, of course, Mr. Gaynor's acknowledgment at TR 535 in response to a question on cross-examination that one of his reasons for demoting Mr. Harris was the train delays and Mr. Harris' refusal to admit his responsibility for those delays. To claim that the LIRR abandoned at the trial its contention that Mr. Harris was responsible for the train delays and that this, coupled with the other reasons,[19] was the basis for his demotion, is patently ridiculous, particularly in view of the time, money and effort made by the LIRR to introduce into the record the testimony of Messrs. Segreto, Civitillo, Lehr, Quinn, Hodges, Jacques and Rubin. All of their testimony, as summarized in Addendum A, pages A1-A2, was introduced primarily to demonstrate Mr. Harris' responsibility for the train delays.

The facts are, even though the court below did not specifically find Mr. Harris responsible for the delays, that the

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[19] i.e. insubordination and past record of poor performance and insubordination.

testimony and evidence of record shows clearly that Mr. Harris' failures as an ASM resulted in the delay to Train 1602 because Train 1691 was not told to pull west on arrival,[20] in the delay to Train 82 because Mr. Harris failed to have Train 493 pull west on arrival or arrange for its subsequent repositioning on the platform track,[21] and in the delays to Trains 1691 and 195 by failing to issue appropriate instructions to have them brought in from the tunnel while Train 82 was being repositioned to depart via line 1. (TR 351-354). This was the essence of the findings of the court below at pages 6 and 7 of its Opinion when it pointed out in specific terms the negligence of Mr. Harris.

Plaintiff, in his brief at p. 65, implies that the Court found Harris to be an honest man. (OP p. 21). In making that statement, the Court was referring to the nature of the charges that the Railroad had brought against Harris and was merely saying that these charges did not accuse Harris of an act of moral turpitude sufficient to give rise to a due process hearing.

That the Court found Harris to be an incredible witness is amply evident from the Opinion. By finding that Harris declined to stay late (OP p. 8), the Court is implicitly rejecting Harris' testimony that he remained at work on the morning of the 11th, went to the police locker room, and caught an 8:10 train home. By finding that Harris failed to promptly reposition and avert or reduce the delays of following trains (OP p. 7), the Court is rejecting Harris' incredible testimony that he had spoken to the train crew (which was denied by all crew members) and that he made P.A. announcements to Train 1691 as it pulled in (which is proven false by the tape transcripts—Exh. P). By finding that Harris could have written the report on the night

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[20] See Addendum A, pages A1 and A2.

[21] See Addendum A, pages A3, A4 and A5.

of Nov. 10-11 (OP p. 8), the Court is rejecting Harris' testimony that he didn't have time.

Therefore, when the Court "found no evidence of dishonesty or immorality on the part of the plaintiff," the Court was clearly not evaluating the weight to be given to plaintiff's testimony, as plaintiff's counsel would have us believe. Indeed, the bottom line of the entire opinion is that the Court did not believe the testimony of Mr. Harris.[22]

3. Plaintiff's Past Record of Poor Performance and Insubordination

As the court below noted (OP p. 12), Mr. Harris' past conduct as an ASM, including the reprimands and notices of his poor performances in 1974 and 1975 and the activities and evidence of insubordination surrounding his 60-day suspension in 1975, must be considered in upholding his present removal. Plaintiff attempts at page 64 to minimize the findings of the court below in this regard by pointing out that the court below relied principally on evidence introduced at the 1975 hearing, with some sort of unstated inference that this taints the findings of the court below. Plaintiff, of course, ignores the fact that at the hearing on December 10, 1976, at TR 4, his counsel, Mr. Holwell, stated in response to an inquiry from Judge Gagliardi that he was all in favor of incorporating the 1975 record by reference into the instant record.

Be that as it may, the fact is the LIRR introduced during the 1975 hearing some 10 exhibits[23] indicating various failures or improper performance of duties by Mr. Harris during the period October 1974 to September 1975. At the 1975 hearing, Mr. Harris, when cross-examined about his prior record as an ASM, admitted the factual truth of a

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[22] Addendum A, annexed hereto, indicates the ample evidentiary reasons for the court below to not believe Mr. Harris.

[23] 75 D Exh. B, C, D, E, F, G, H, I, J, K and L.

number of these reprimands and memoranda. (75 TR 163-189).[24] The court below also had before it the testimony of Mr. Stewart as to problems with and failures of Mr. Harris from April 1971 to March 1972. (75 TR 237-239; 75 D Exh. S, T, U, V and W).

As to plaintiff's footnoted comment that Mr. Gaynor's reprimands and notices only began to flow after Mr. Harris' return to work in 1974 following his successful completion of his second Rules Book examination, this ignores the fact that Mr. Gaynor only became Terminal Superintendent at Penn Station on June 5, 1974, and it is hardly likely that he would start reprimanding Mr. Harris prior to that.

Plaintiff's attempt to avoid his acceptance of the 60-day suspension for insubordination in 1975 is not well founded. In his brief, at page 65, he claims his acceptance of the suspension was primarily so as to get back on the job since Judge Gagliardi, he alleges, was not likely to file his decision for at least 30 additional days. First, Mr. Harris was not being prevented from working as an usher during this period either by the Railroad or the court below. It was his own voluntary act to refrain from working as an usher. (75 TR 422, lines 21-23; See also, Transcript of September 17, 1975, pages 7, 8).

Second, the court below did not state it was going to take an additional 30 days before rendering a decision as intimated by plaintiff (Plaintiff's Brief, page 20); it was merely asking the LIRR to waive its 29-day rule in regard to demoted management personnel bidding back to a represented position. (75 TR 421, 422). This, of course, was done by Judge Gagliardi for Mr. Harris' protection, since the 29-day period had commenced on September 12, 1975, and the court below made its request on October 2, 1975, when some 20 days of the 29-day period had already expired. Manifestly, the 60-day suspension was a deal plain-

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[24] For a listing of specific examples, see Addendum B.

tiff couldn't refuse since his alternative was a probable adverse decision from the court below and a permanent demotion.

As was indicated by Gaynor (TR 493), one of his many reasons for demoting Mr. Harris was ". . . his attitude, his acts of insubordination, no change in his attitude towards making writeups, his lack of willingness to accept responsibility and his attitude toward his fellow employees." That Mr. Gaynor was justified in demoting Mr. Harris on these grounds alone is amply substantiated by the record.[25] Mr. Harris was not only insubordinate on this occasion, but had been guilty of insubordination on two other occasions.[26] He basically did not get along with his co-workers[27] and demonstrated an attitude towards his job that was incompatible with holding a management position.[28] Thus, the court below was amply supported in its finding that Mr. Harris' past conduct as an ASM justified his demotion by LIRR.

B. The LIRR's Reasons for Demoting Mr. Harris Were Not Pretextual

As was admitted by plaintiff at pages 33 and 34 of his brief, the court below recognized the order and allocation of proof in an employment discrimination case as set forth by the Supreme Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1972). Judge Gagliardi first found that Mr. Harris, by his testimony, if not refuted, had made out a *prima facie* case, which then shifted the burden to defendant LIRR to show valid, non-discriminatory reasons for Mr. Harris' demotion. (OP 10, 11). Judge Gagliardi, for the reasons hereinbefore set forth, found that upon all

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[25] See Addendum C annexed hereto.

[26] Addendum C, page C1.

[27] Addendum C, pages C1-C3. See also, OP p. 24, footnote 5.

[28] Addendum C, pages C4-C5.

of the evidence, including the demeanor of witnesses, that Mr. Harris' demotion was for valid, nondiscriminatory reasons and that, therefore, the LIRR had sustained its burden of proof. (OP 11, 12). The court below then noted (OP 13) that the burden of persuasion returned to the plaintiff to show that the LIRR's stated reasons were, in fact, merely a pretext for discrimination or retaliation prohibited by Title VII. Having noted the return of this burden to plaintiff, Judge Gagliardi held that plaintiff had failed to meet its burden and thus he was not entitled to the injunctive relief sought. (OP 13, 14, 15).

In finding that the plaintiff had failed to meet its burden in regard to the pretextual issue, the court below noted that proof of a statistical imbalance in LIRR's management hiring is alone not enough to show such pretext. (OP 13). Such a holding is clearly not erroneous in the face of the evidence of record which showed that at Penn Station, a substantial number of management personnel were of minority classification and that all of these had been promoted to their positions by LIRR subsequent to its taking over responsibility for Penn Station ASMs in July 1964. (TR 579-584). Further, the testimony of Mr. Zeman (TR 736-TR 750) showed that the LIRR's EEOC statistics, relied upon by plaintiff, were understated, particularly in regard to management personnel, by about 20 percent. Needless to say, the court below was clearly not acting erroneously in being reluctant to give any substantial weight at this time to such evidence. Thus, it was not that the court below failed to consider plaintiff's evidence of alleged LIRR discriminatory patterns and practices, it merely found the evidence to be insufficient to prove anything.

As was noted in *King* v. *Yellow Freight System Inc.*, 523 F. 2d 879 (8th Cir. 1975) at p. 882 in affirming a finding that a black employee was dismissed for a nondiscriminatory reason:

Although statistical evidence of a pattern or prac-

> tice of discrimination is of probative value in an individual discrimination case for the purpose of showing motive, intent or purpose, * * * it is not determinative of an employer's reason for the action taken against the individual grievant.
>
> *See also Terrell* v. *Feldstein Co., Inc.*, 468 F. 2d 910 (5th Cir. 1972).

As to plaintiff's claim (Plaintiff's Brief pp. 41-44) that the mere existence of subjective disciplinary standards is proof of discrimination, once again the law is misrepresented. While admittedly the existence of subjective standards can be a vehicle for discrimination, absent proof or evidence of disparate treatment between whites and blacks under such subjective standards, there can be no finding of a violation of Title VII merely from the existence of the subjective standards.

In the instant case, the court below found that the LIRR had introduced evidence of 20 white management employees who were dismissed or demoted between 1971 and 1975, ten of whom were demoted for insubordination for refusing to cross a picket line while the balance were disciplined for a variety of other reasons. (OP 14). The court below similarly noted that some other white employees had received lesser discipline for different infractions, but Judge Gagliardi refused to find that these instances sustained plaintiff's burden of proof in showing disparate treatment in that he hadn't shown his punishment was more severe than that of white employes for the same offense or that his offense was less egregious than those of the white employees dismissed or demoted. (OP 14).

Plaintiff argues (pp. 45, 46 of his brief) that he received disparate treatment in that the LIRR never made any effort to transfer him to another station as it allegedly had with some white employees and that the LIRR never afforded him an opportunity to explain his version of events

prior to demotion as Mr. Dixon indicated was regular practice with management employees. In regard to plaintiff's first contention, it should be noted that this was Mr. Harris' third offense of insubordination,[29] not his first, and considering the nature of the offenses, he received very lenient discipline on both of the prior occasions. In regard to his second contention, plaintiff ignores, of course, the testimony of Mr. Gaynor,[30] confirmed by Mr. Bloomfield,[31] that upon arriving at Penn Station shortly before 11:00 p.m. on November 11, 1976, Mr. Harris was met by Mr. Gaynor, who upon finding out that Mr. Harris had not prepared the promised report, did exactly what plaintiff says should have been done; namely, he asked Mr. Harris for his version of the events. Upon receiving either noncommittal, unsatisfactory or no answers, Mr. Gaynor advised Mr. Harris that he was being demoted and why.

Plaintiff also claims (Plaintiff's Brief pp. 35-38) that the court below committed error by not making specific findings in regard to Mr. Harris' allegations of prior discrimination and retaliation against him by LIRR. The court below was familiar with Mr. Harris' allegations, but in the face of the evidence presented by LIRR[32] and particularly in view of the fact that LIRR did not become responsible for hiring or appointing Penn Station ASM's until 1964 and in 1966 came under the ownership of MTA,

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[29] Insubordinate to Mr. Stewart on July 21, 1971—discipline: reprimand (75 TR 237, 238); insubordinate to Mr. Rizzacasa on Sept. 12, 1975—discipline: 60-day suspension from ASM position (75 TR 353, 354; 75 TR 297); insubordinate to Mr. Gaynor on November 11, 1976—discipline· demotion to usher. See also: Addendum C.

[30] TR 490-492.

[31] TR 456-458; D Exh. L.

[32] Summarized in the Statement of Facts, *supra* pp. 3-4.

an agency of the State of New York,[33] it did not see fit to make extensive findings in this regard. Obviously, with this record, the action of the court below was not clearly erroneous and its decision should be affirmed.

Conclusion

The court below dealt with a record of over 1200 pages and more than 75 exhibits[34] in a 25-page, well-reasoned opinion. No error of law was committed by the court below and none of its findings of fact are clearly erroneous. The decision of the court below should be affirmed in all respects.

Respectfully submitted,

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[33] As a state agency (see *Long Island R.R. Co.* v. *Public Service Comm'n.*, 30 App. Div. 2d 409, 292 N.Y.S. 2d 167 (2nd Dept. 1968), *aff'd* 23 N.Y. 2d 852, 298 N.Y.S. 2d 65 (1969); *Levine* v. *Long Island R.R. Co.*, 38 App. Div. 2d 936, 331 N.Y.S. 2d 451 (2nd Dept.), *aff'd* 30 N.Y. 2d 907, 335 N.Y.S. 2d 565, *cert. denied*, 409 U.S. 1040 (1972)), neither LIRR nor MTA were really subject to Title VII until 1972, *see, Hazelwood School Dist.* v. *United States*, —— U.S. —— (June 1977); *see also Popkin* v. *N. Y. State Health and Mental Hygiene Facilities Improvement Corp.*, 409 F. Supp. 430 (S.D.N.Y. 1976). Moreover, it would appear that much of Mr. Harris' allegations would be time barred under *United Air Lines* v. *Evans*, —— U.S. —— (May 31, 1977).

[34] The total of both the 1975 and the 1976 hearings.

ADDENDUM A

Most arguments advanced by plaintiff in his brief depend and rely upon Mr. Harris' version of events being accepted as true. The court below had ample opportunity to observe the demeanor of the various witnesses and evaluate their credibility not only during the six days of evidentiary hearings in December 1976 and January 1977, but also in the three days of evidentiary hearings in October 1975. That the Court's refusal to give full credence to Mr. Harris' testimony and claims is not clearly erroneous is amply substantiated by the following comparison of evidence.

MR. HARRIS' TESTIMONY	DEFENDANT'S EVIDENCE TO CONTRARY
a. *Delay to Train 1602* (turnaround of Train 1691)	
(TR 53-55) Harris testified as to a radio conversation with the engineer of Train 1691 in regard to his being held in the tunnel and that he told him that when he pulled in he would have to pull west because line 3 was out of service.	(TR 385-388) Witness Quinn, engineer of Train 1691, denied having had any such conversation with Mr. Harris. (TR 422-425) Witness Hodges, conductor of Train 1691, denied any such conversation took place. (TR 435) Witness Shearer, usher on duty with Mr. Harris, denied hearing any such conversation.
(TR 56, 57; TR 110, 111) Mr. Harris testified both on direct examination and on cross examination that when Train 1691 did get into the station, he advised them	(TR 386-388) Engineer Quinn denies hearing any such radio or P.A. communication although he was listening for it. (TR 425-426) Conductor

over the radio and had the usher advise them over the P.A. system to pull west.

Hodges denies hearing any such radio or P.A. communication although he was listening for it.
(TR 435) Usher Shearer denies ever receiving any such instructions from Mr. Harris.

The tape recording of P.A. announcements made that night show no such announcement was made. (D Ex. P)

(TR 56; TR 110, 111) Mr. Harris testified that when Train 1691 did come in, he saw immediately that while it had pulled west, it was short of the clearance point by some 10 or 12 feet.

(TR 278) Raymond Jacques, engineer of Train 1602 (the turn-around train of 1691's equipment) testified that when he went to the equipment he found 1691 had stopped in its normal position and had not pulled west at all.
(TR 287) Al Rubin, conductor of Train 1602, testified that when he reported to his train, he found it was in the normal position and had not been pulled west.
(TR 426) Conductor Hodges testified that Train 1691 stopped normally and did not pull west.
(TR 435, 436) Usher Shearer firmly stated that from the stationmaster's office he saw 1691 platform normally and that it had not pulled west at all.

b. Failure to Write Report

(TR 71, 72; TR 123-128) Mr. Harris testified he was unable to write the report for Mr. Gaynor during the night of Nov. 10-11 because he was too busy with the Sperry cars operating through line 3 that night. He also testified that between 2:30 a.m. and 2:40 a.m. he had worked up the revised lineup for the trains with Yardmaster Lehr.

(TR 438-439) Usher Shearer testified that Mr. Harris was on "lunch break" between 1:45 a.m. and 2:50 a.m. and that he (Shearer) had worked out the revised lineup changes with Mr. Lehr. Mr. Shearer went on to identify the specific entries in his handwriting on the stationmaster's Train Record Sheet. (D Ex. B)*

* It should also be noted that D Ex. B shows no LIRR trains entering or leaving Penn Station between 3:21 a.m. and 4:22 a.m.

(TR 72, 72; TR 128, 129) Mr. Harris claims when he was relieved about 7:00 a.m., he attempted to write the report in the stationmaster's office, but because of the number of people and interruptions, he gave up and went to the usher's and police locker room to write it. But as he kept dozing off, he finally quit and caught the 8:10 a.m. train to Jamaica. From his home, he called Mr. Rizzacasa to explain that he had been unable to write the report but would bring it in that night.

(TR 440) Usher Shearer saw Mr. Harris writing in the log book between 7:00 a.m. and 7:05 a.m. (TR 430, 431) Andrew Larsen, LIRR Police Officer, testified he was in the usher's and police locker room on the morning of Nov. 11 from about 7:25 a.m. to 7:45 a.m. and never saw Mr. Harris.
(TR 578, 579) Mr. Rizzacasa, LIRR Terminal Trainmaster at Penn Station, recalls seeing Mr. Harris rush to catch a 7:02 a.m. train and recalls receiving a phone call from Mr. Harris be-

tween 8:20 a.m. and 8:25 a.m. Since Jamaica is an 18 to 20 minute ride by train from Penn Station, Mr. Rizzacasa labeled Mr. Harris' claim to have caught the 8:11 train as impossible.

c. *Delay to Train 82*

(TR 11) Mr. Harris acknowledges when he came on duty, he was advised tunnel line 3 would be going out of service during his shift.

(TR 34) Harris claims he called Yardmaster Lehr about 11:45 p.m. Nov. 9 and was told he did not yet have the specific time of the line closing.

(TR 37-40) Harris claims about 11:55 p.m. Nov. 9 he heard Lehr call C Tower on the 3-way squawk box system and say that line 3 would be going out during the night and when it does, please inform us of any fouling. Harris claims he reiterated Lehr's request to C Tower and that the operator of C Tower, Mr. Civitillo, acknowledged and promised he would. Harris concedes Lehr called him about a revised line-up at 12:05 a.m. but claims that Lehr started the line-up revision with

(TR 191, 192; 195-209) Lehr testified that at 11:45 p.m. he talked to A Tower and agreed line 3 would go out of service after Train 400 departed at 12:21 a.m. At 11:55 p.m. Lehr called Harris and Civitello on the 3-way squawk box and advised them that after Train 400 left, line 3 would close. At 12:05 a.m., he called Harris on the direct line and gave him the complete revised line-up of trains starting with Train 193.

(TR 242) John Segreto, Train Director at A Tower, verified he talked on the phone with Lehr at 11:45 p.m. Nov. 9 and that they agreed line 3 would go out of service after Train 400 departed. Mr. Segreto also testified that at 11:55 p.m. he announced over the squawk box system to all towers and the LIRR Stationmaster's office that line 3 would go

Addendum A

Train 802 departing at 1:01 a.m. but denies Lehr gave him any instructions or track changes for trains prior to Train 802 departing at 1:01 a.m.

(TR 43-45) Mr. Harris denied being told at any time to have Train 489 pulled west or do anything but platform normally although he admits (TR 104) that he was in the office at 12:18 a.m. and did record the time that Train 489 passed Harold Tower.

(TR 41, 42; TR 106-109) Mr. Harris claims he did not hear any of the announcements over the speaker system about line 3 going out of service and about Train 489 having to be pulled west. He claimed to have been out of the office a number of times; specifically a passenger came in and asked Mr. Harris to look at a locker and see if his keys were there (TR 107); the usher reported the light out on Track 15, (TR 107); he delivered the track changes to the ticket clerks (TR 108); went out at 12:11 a.m. to check departure of Train 80 (TR 103).

out of service after Train 400 left.

(TR 342) C Tower Operator Civitillo confirmed the announcement by A Tower that line 3 would go out of service after Train 400 left.

(TR 203-205) Mr. Lehr testified that during the 12:05 a.m. conversation he told Harris to have Train 489 (which turned to become Train 82 departing at 12:41 a.m.) pulled west on arrival (so it could depart line 1).

(TR 344, 345; 378) C Tower Operator Vincent Civitillo testified that at about 12:18 a.m. after reporting Train 489 past Harold Tower over the squawk box system, he got the track for it from Mr. Lehr and heard him tell Harris to be sure and have Train 489 pull west. Mr. Civitillo also testified that at 12:19 a.m. he advised Lehr over the 3-way squawk box system that as soon as Train 400 left, the M of W equipment would go into Track 19 preparatory to entering line 3 as soon as Train 400 cleared the tunnel and the track would be out of service.

(TR 192, 226) Mr. Lehr confirmed this announcement.

(TR 243) Mr. Segretto confirms being advised by C Tower at about 12:20 a.m.

that a hold was on Track 19.
(TR 433, 434) Usher Shearer testified that he closed the gates for Train 80 at 12:10 a.m. and it departed on time. That he never saw Harris go down to or back from station platform and Harris would have had to pass him directly to do so.
(TR 436, 437) Usher Shearer did not recall any passenger coming in with questions for Harris during this period and that if Harris left the stationmaster's office, he would usually notify him and during this period he did not do so.
(TR 440, 441) Usher Shearer had no recollection of Harris leaving the office to give line-up to ticket clerk or to help passengers and Harris was definitely in the office every time he looked.

ADDENDUM B

A. List of examples of reprimands and other memoranda regarding Mr. Harris' failures to properly perform his duties as an ASM about which he was cross-examined (75 TR pp. 163-189) at the 1975 hearing and admitted the truth of the facts.

1. 75 Ex. E—failure to cancel PPW 1258 on October 6, 1974
   (75 TR 163, line 20 to 75 TR 164, line 5)

2. 75 Ex. D—failure to note in the stationmaster's log book the arrest of a passenger in the stationmaster's office in January 1975
   (75 TR 166, lines 17-24)

3. 75 Ex. F—failure to write up the Amityville work program on October 11, 1974
   (75 TR 172, line 4—75 TR 173, line 2)
   (75 TR 206, line 1—75 TR 108, line 11)
   (75 TR 216, line 20—75 TR 218, line 8)

4. 75 Ex. G—a. failure on Nov. 7, 1974, to note in the stationmaster's log book that line 4 was out of service from 2:00 a.m. to 4:55 a.m.
   (75 TR 173, lines 13-24)

   b. failure to fill out TSP-119 reports recording work done for LIRR by Penn Central employees
   (75 TR 173, line 25—75 TR 175, line 9)

   c. failure to sign Allied Maintenance work sheets attesting to spot checks on work done.
   (75 TR 175, line 10—75 TR 176, line 25)

5. 75 Ex. B—failure to ascertain the cause and take appropriate action regarding delays to Trains

Addendum B

90 and 708 on Nov. 15, 1974
(75 TR 177, line 1—75 TR 182, line 25)

B. Analysis of plaintiff's attempts to explain or refute of record the above examples of failures to properly perform his duties as an ASM.

1. failure to cancel PPW 1258 on October 6, 1974

Plaintiff (75 TR 163, line 23 to 75 TR 166, line 9) first admitted that he had allowed Train PPW 1258 to leave Penn Station but tried to imply because it only went to Harold Tower on the other side of the East River tunnels and was returned to Penn Station by that Tower, he could not be held to account for having failed to cancel that train. His excuse for his failure to cancel the train was that even though admittedly instructions in regard to the cancellation had been posted, he had not been reminded of the cancellation by 204 or the yardmaster. (75 TR 164, lines 9-21). He admitted he had failed to check the clipboard on the office wall when he arrived and that he really never did until it suited his convenience. (75 TR 164, line 22—75 TR 165, line 5). This is another instance where Mr. Harris fails to demonstrate sufficient interest or initiative in his job but relies upon subordinates or other offices to call his attention to matters that might require special handling.

2. failure to note in the stationmaster's log book the arrest of a passenger in January 1975

Mr. Harris admitted (75 TR 166, lines 17-24) that he had not made a notation in the log book about the arrest even though he had been present when the arrest was made. Mr. Harris' excuse was that because he had reported it to the trainmaster on duty at Jamaica, that that was sufficient. (75 TR 167, lines

4-24). From 75 TR 167, line 23, to 75 TR 171, line 23, Mr. Harris, in response to various questions, expounded on why having reported it to the 204 office at Jamaica that that should have sufficed since the terminal superintendent, if he was interested in finding out what happened the preceding night could always call them or check the records of another department, the Police Department, for such information as he desired. Needless to say, this testimony of Mr. Harris epitomizes his undesirability as a member of management. In contrast, Mr. Gaynor (75 TR 385, line 7 through 75 TR 386, line 5) indicated why proper entries in the stationmaster's log are of importance to him.

3. failure to write up the Amityville Work Program on October 11, 1974

Mr. Harris admitted that he had not written up the Amityville Work Program that day and that it had been done during his lunch break by his relief, Mr. Partridge. (75 TR 172, lines 4-9). As explained by Mr. Harris, a Work Program was a message to train crews to advise them that work was being done in a particular area and the train crew should exercise caution to avoid endangering the safety of the work crews. (75 TR 172, line 10—75 TR 173, line 3). Under redirect examination, Mr. Harris explained that on that day his relief had failed to show up and that during the commission hours, he had been very busy and when the stationmaster, Mr. Partridge, arrived at 10:00 a.m., he was told to go to lunch and return at 11:00 a.m. When Mr. Harris returned from lunch, Mr. Gaynor walked in and asked about the Amityville Work Program and upon checking, Mr. Harris found that Mr. Partridge had completed it while he,

Mr. Harris, had been at lunch. (75 TR 206, line 1—75 TR 208, line 11). However, upon recross-examination, Mr. Harris allowed that the approximate running time from Penn Station to Amityville was about 55 minutes and that if the work gangs were to commence work at 10:00 a.m., the Program should have been made up and posted by 9:00 a.m., an hour before Mr. Harris was relieved for lunch. (75 TR 216, line 20—75 TR 217, line 24). So much for Mr. Harris' concern for the safety of his fellow workers and the proper performance of his duties.

4. failure to:

a. note line 4 out of service in stationmaster's log book For a change, Mr. Harris was frank and honest and admitted he had forgotten to enter the line closing in the log book before he left. He went on to indicate that he hoped to enter it during his next tour of duty and presumedly hoped his lapse wouldn't be noticed. Unfortunately for Mr. Harris, the terminal superintendent, Mr. Gaynor, as was his usual custom, checked the log book the next morning and when he later found out line 4 had been out of service during the preceding night, sent a memo to Mr. Harris asking why a log entry had not been made. Mr. Harris, as was his custom, never bothered to give Mr. Gaynor a reply (75 TR 173, lines 8-24).

b. failure to fill out the TSP-119 reports

Mr. Harris readily admitted that he was aware that these forms were part of the LIRR's cost accounting procedure to determine if it was properly billed by Penn Central for work they claimed their employees were doing at Penn Station on behalf of LIRR. (75 TR 173, line 25—75 TR 174, line 17). Mr. Harris

also admitted that for some period of time prior to November 7, 1974, he had failed to fill out the reports as required because the Penn Central foremen had ceased reporting to him (75 TR 174, line 18—75 TR 175, line 1). He claimed he did not report this to any of his superiors because some unidentified person told him not to bother and, of course, Mr. Harris did not bother to even inquire whether or not the LIRR might be adversely affected.

c. failure to certify the Allied Maintenance worksheets. Once again, Mr. Harris readily admitted that he was aware of the cost accounting purposes of the worksheets. (75 TR 175, line 10—75 TR 176, line 1). He also admitted not signing the forms because he didn't feel he could do so on the basis of spot checks but would have to inspect every speck of the work first and he just didn't have the time to do that. (75 TR 176, lines 3-25). Mr. Harris' dedication to the Company's interest is so easily outweighed by his dedication to his own convenience.

5. failure to ascertain the cause and take appropriate action regarding the delays to Trains 90 and 708.

It is uncontested that Train 90 was delayed approximately 9 minutes. According to Mr. Harris, the conductor did not advise him of any problem until after departure time when he called to advise he did not have a communicating whistle By the time he got down to the track to get the problem corrected, the train pulled out and over the radio told him the problem had been no door lights. (75 TR 177, line 1—75 TR 178, line 18). Mr. Harris then went over to Track 16 where Train 708 was having similar problems which were corrected by uncoupling and recoupling the train several times. Mr. Harris admitted he did

not make any inquiries to find out if the whistle had worked when the brake tests were given or why the train crew hadn't reported the delays sufficiently in advance of departure to avoid the delays. (75 TR 179, line 16—75 TR 182, line 25). The bottom line turned out to be that it was getting close to Mr. Harris' relief time and he didn't want to be late in leaving for home. (75 TR 182, lines 18-25).

C. Summary

There can be no doubt but that these were the five instances from the 1975 record referred to by the Court below (OP 4) which it said were not effectively rebutted by Mr. Harris. Beyond cavil, the Court's finding in this regard was not clearly erroneous.

ADDENDUM C

Plaintiff Harris' attitude towards his superiors, coworkers and job.

A. Attitude toward superiors.

1. Insubordinate to Mr. Stewart, LIRR Terminal Superintendent on July 21, 1971. Mr. Harris refused to obey a direct order to catch up and update the train record sheets when he had lost complete track of all inbound and outbound trains at Penn Station.
   Discipline: reprimanded (75 TR 237, 238)

2. Insubordinate to Mr. Rizzacasa, LIRR Terminal Trainmaster, on September 12, 1975. Mr. Harris refused to comply with a direct order to have the usher make a proper announcement and talked back to his superior. Discipline: 60-day suspension from his ASM position. (75 TR 353, 354; 75 TR 297); See also, *infra,* p. C5, item 3b.

3. Insubordinate to Mr. Gaynor, LIRR Terminal Superintendent during period November 10-11, 1976. Mr. Harris failed to comply with a direct order to prepare and hand in promptly an additional report covering the train delays of November, 9-10, 1976.
   Discipline: Demotion from position of ASM to position of usher. (TR 490, 492; 456-458; See also, Addendum A. p. A2, item b; *supra,* this brief argument, Point II, A, 1.)

B. Attitude towards coworkers.

1. Unable to get along and cooperate with them.

   a. Mr. Civitillo, Operator of Amtrak C Tower: "This is normal routine garbage. Everytime everybody says something to the Sta-

tionmaster to pull these damn trains west, they never get pulled west. They always block and foul." (D Exh. P — Transcript of taped telephone conversation between Mr. Civitillo and Mr. Tietjen, LIRR Chief Dispatcher, on Channel 9 at 1:08 a.m. November 10, 1976, concerning Mr. Harris and the train delays that night.)

b. Mr. Romero, Amtrak 40 Office at Penn Station:

"This is about the third time we've had trouble with him within the last month, and it's always the same thing, he doesn't understand what's going on. In other words, we didn't deal with Harris. He is a stationmaster. If he has any problems, go over to you or go over to 21 track and have those people talk to him. We don't want to bother with him."

(D Exh. P — Transcript of taped telephone conversation on Channel 9 between Mr. Romero and Mr. Tietjen at 12:54 a.m., November 10, 1976)

c. Mr. Depresso, LIRR Yardmaster at Penn Station in response to an inquiry from Mr. Satter, LIRR Chief Train Dispatcher about whether or not Mr. Depresso had listened to his conversation with Mr. Harris:

"A majority of the problems, whenever there is a problem, he is not in the station." (D Exh. P—Transcript of taped telephone conversation between Mr. Depresso and Mr. Satter on Channel 9 at 3:17 a.m. on September 16, 1976).

d. Mr. Segreto, Amtrak Train Director at A Tower, direct testimony of prior problems with Mr. Harris about his harassing the new man at JO Tower and preventing him from properly performing his duties. (TR 248-250).

e. Mr. Satter, LIRR Chief Train Dispatcher,

(1) direct testimony as to trying to find out about train delays the night of September 16, 1976, when a tunnel line was out of service and found him in the PD-4 office stapling papers instead of being in the stationmaster's office supervising operations.
(TR 315-317)

(2) Mr. Harris, in response to Mr. Satter's criticism of him, told him to stop using racial overtones.
(TR 317; D Exh. P Transcript of taped telephone conversation between Mr. Satter and Mr. Harris on Channel 9 at 3:09 a.m. on September 16, 1976)

2. Disregard of coworkers' safety—Mr. Harris' failure to write up the Amityville Work Program to alert train crews operating in the area to exercise caution because of work gangs on the tracks. (75 TR 172, 173; 75 TR 206-208; 75 TR 216-218)

3. Despite the fact that plaintiff's counsel indicated they had a rebuttal witness (TR 235), note should be made of the fact that not a single coworker came forward to verify or substantiate any of Mr. Harris' claims or allegations or help him in any way.

Addendum C

C. Attitude toward job.

1. Not caring whether or not work is properly performed or LIRR's interests are protected.

   a. Failing to fill out and file forms recording work claimed to have been done for LIRR by Penn Central employees. (75 TR 173-175)

   b. Failing to certify Allied Maintenance work sheets attesting to spot checks of work done. (75 TR 175-176)

   c. Stapling sheets in PD-4 Office when a tunnel line was out of service and train delays were occurring. (TR 315-317)

2. Feeling he is above criticism or discipline in regard to his work.

   a. Reply to Mr. Satter on Sept. 12, 1976, when questioned and criticized for his handling of operations that night that he should stop being racist. (TR 317; See also, D Exh. P. tape transcript of 3:09 a.m., Sept. 12, 1976, telephone conversation between Mr. Satter and Mr. Harris)

   b. Response to Mr. Stewart in 1971 when Mr. Stewart tried to advise him on what he needed to do to advance himself was that he was only interested in forcing the LIRR to install a black as general manager or vice president.
   (75 TR 251, 252)

   c. Mr. Harris testimony at the 1975 hearing that he viewed all comments and criticisms from his superiors as degrading. (75 TR 144-148)

d. On November 11, 1976, when directed by Mr. Gaynor to exercise his seniority as an usher and the reasons for his demotion, Mr. Harris advised him that he would see him in court and the court would put him back as an ASM.
(TR 492; TR 457; D Exh. L)

3. Failure to meet other job responsibilities.

a. Falling asleep in car instead of reporting to scheduled Book of Rules exam and then going home without notifying anyone. (75 TR 46-47, 348-350, 373-374)

b. Refusal to work past scheduled end of shift and only staying when threatened with demotion despite the fact that similar incident happened only one day previously. (75 TR 344-345)

c. After seeing dentist on November 11, going home and going to bed instead of writing report which he had promised to bring with him that night. (TR 73-75)

Service of three [3] copies of
the within
hereby admitted this 14 day
of July 19
White, Cone
Attorney for Def-appts